149 U S 782

RECORD, CASE No. 13,852.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 242.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY, APPELLANT,

vs.

O. MASON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 21, 1889.

RECORD, CASE No. 13,852.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 242.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY, APPELLANT,

vs.

O. MASON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Bill of complaint	3	1
Appearance for defendant railroad companies	9	5
Subpœna	11	5
Marshal's return	12	6
Appearance for the Town of Aurora	13	6
Answer of the Town of Aurora	14	7
Answer of the Ottawa, Oswego and Fox River Valley Railroad Co.	24	12
Replication	29	15
Order on defendant railroad company to close proofs	31	16
Stipulation as to evidence, &c.	32	16
Certificate No. 60	33	17
Bond No. 31	34	17
Proceedings of town meetings	36	18
Deposition of Ralph Plumb	40	20
Wm. H. Miller	46	23
Ralph Plumb	51	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1892.

	Original.	Print.
Exhibit A—Agreement between Noble *et al.* and Young, April 22, 1869, &c.	57	30
Final decree	72	38
Allowance of appeal	73	38
Bond	74	38
Certificate of evidence	76	40
Clerk's certificate	77	40
Assignment of errors	78	40

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, on Tuesday, the sixteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

O. MASON
vs.
THE TOWN OF AURORA and THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the eighteenth day of May, 1885, came the complainant, by his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bond for costs and bill are of complaint in said above-entitled cause, which said bond and bill in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court, July Term, A. D. 1885.

O. MASON
vs.
THE TOWN OF AURORA *et al.* } In Chancery.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by compl't I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 18th day of May, A. D. 1885.

GEORGE A. SANDERS.

Endorsed: Filed May 18th, A. D. 1885. Wm. H. Bradley, clerk.

3 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court of the United States, July Term, A. D. 1885.

To the judges of said court, in chancery sitting:

Your orator, O. Mason, who is a citizen of Massachusetts, brings this his bill of complaint against The Town of Aurora, a body cor-

porate organized under and by virtue of the laws of the State of Illinois and located in Kane county, in said northern district of Illinois; The Ottawa, Oswego and Fox River Valley Railroad Company, both corporations and existing under and by virtue of the laws of the State of Illinois and located in said northern district of Illinois and citizens of said State of Illinois, defendants.

And thereupon your orator charges and says that on, to wit, *on* the 21st day of June, A. D. 1852, said Ottawa, Oswego and Fox River Valley Railroad Company was duly incorporated under and by virtue of an act of the legislature of the State of Illinois entitled "An act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company," approved June 21, 1852, and in force August 22, 1852.

That on, to wit, February 18, 1857, said legislature of Illinois passed a further act, entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," in and by which act it was provided that any city, county, incorporated town, or any township now or hereafter organized under the township organization laws which
4 may be situated on or near the route of the Ottawa, Oswego and Fox River Valley Railroad Company may become subscribers to the capital stock of said company and issue bonds in payment therefor.

That on, to wit, April 20, 1869, said legislature passed a further act entitled "An act to amend an act entitled An act authorizing certain cities, counties, towns, and townships to subscribe to the stock of certain railroads," in force Feb'y 18th, 1857, which said amended act is found in the Private Laws of Illinois of 1869, vol. 3, page 362.

That said The Town of Aurora, being one of the towns contemplated by said acts of February 18th, 1857, and April 20, 1869, and in pursuance of the provisions of said act of Feb'y 18, 1857, to wit, on February 26th, 1869, at a special meeting or election called for that purpose, voted to subscribe sixty thousand dollars to the capital stock of said Ottawa, Oswego and Fox River Valley Railroad Company and in payment therefor issue its certain sixty bonds of one thousand dollars each, payable at various dates from the 1st day of July, 1869.

That in pursuance of said several acts and said election of Feb'y 26, 1869, the supervisor and town clerk of said town executed and delivered sixty bonds of said town of the denomination of one thousand dollars each, with interest at ten per cent. per annum to the date of their maturity respectively, in payment for stock in said Ottawa, Oswego and Fox River Valley Railroad Company of the par value of sixty thousand dollars, which was duly issued and delivered to said The Town of Aurora in consideration of the said bonds of said town; that a certificate for said $60,000.00 was
5 duly issued to said town by said Ottawa, Oswego and Fox River Valley Railroad Company, which said town now holds.

And your orator avers that said bonds were duly delivered to said Ottawa, Oswego and Fox River Valley Railroad Company, which in

turn sold the same or delivered the same in payment of the construction of the Ottawa, Oswego and Fox River railroad, and that the said sixty bonds were used and went towards paying for the construction of said railroad.

That said bonds were of the same tenor and effect and similar to each other, except as to their numbers and dates of payment, and numbered from 1 to 60.

That on, to wit, *on* July 1st, 1869, and before the maturity thereof your orator became the owner of said bonds numbered 31, 32, 39, 40, 41, and 45, of the par value of $6,000, for a good and valuable consideration and without notice of any defences to the same; which said bonds and each of them were duly registered in the office of the auditor of public accounts of said State of Illinois on Oct. 25, 1870, under and in pursuance of an affidavit or certificate duly made and signed by the supervisor of said town on October 11, 1870, and filed with said State auditor on October 13, 1870.

That subsequent to the purchase of said bonds by your orator said town repudiated the same and refused to pay the same; that your orator is still the owner of said bonds, and that the same are due and unpaid.

Your orator further avers that at the October term, A. D. 1876, the Supreme Court of the United States, in the suits of Town of South Ottawa against Perkins *as* Supervisor- of Kendall
6 County against Post, held and adjudged that said act of Feb'y 18, 1857 was never legally and constitutionally passed, and that bonds issued in pursuance thereof were void; that at the October term, A. D. 1881, said Supreme Court affirmed its opinion in said cases in the suits of Post *vs* Supervisors and Amoskeag Bank *vs.* Ottawa, reported in 105 vol. of the United States —, at page 667; that said cases of Town of South Ottawa *vs.* Perkins and Supervisors of Kendall Co. *vs.* Post are reported in vol. 94, U. S. Reports, page 260.

That at the July, A. D. 1880, term of said circuit court of the United States for said northern district of Illinois your orator instituted a suit against said The Town of Aurora for the purpose of recovering on said bonds; that said cause came on to be heard before the Honorable J. M. Harlan, associate justice of the Supreme Court of the United States, on June 14, 1883, and judgment was rendered against your orator for costs, the court holding that said bonds were void under and by virtue of the rulings of said Supreme Court above set forth.

Your orator avers that he has been wholly unable to realize anything on said bonds; that in equity said town is not entitled to hold said stock and reap any profits from the same, it having wholly failed and refused to pay said bonds which were issued in consideration for said stock; that your orator, as the owner and holder of six thousand dollars of said bonds, is justly entitled to an equivalent amount of said stock; that the people of said town have expressed a willingness to surrender said stock upon the delivery of said bonds, but that the officers of said town have neglected and

refused to have said certificate for $60,000 of stock surren-
7 dered and other certificates issued of the denomination of $1,000 each or in such sums as will enable it to exchange said stock with the owners of said bonds, including your orator and the bonds held by him.

That your orator has no remedy in the premises except in a court of equity, where matters of this kind are properly cognizable.

Your orator prays that said The Town of Aurora, the Ottawa, Oswego and Fox River Valley Railroad Company, and the Chicago, Burlington and Quincy Railroad Company may be made parties defendant to this bill, and a summons issue out of this court directing them and each of them to be and appear on a day to be therein named and answer each and every allegation herein contained, not under oath, however, their respective oaths being hereby waived, and answers under seal by said railway company is hereby also waived; and that, on a final hearing of this cause, your orator may be decreed to be the equitable owner of said stock held by said town to the extent and in the sum of six thousand dollars thereof, and that said town may be ordered, adjudged, and decreed to assign, transfer, and set over to your orator upon the surrender of said bonds six thousand dollars of said sixty thousand dollars of said capital stock, and for that purpose that it surrender to the officers of said Ottawa, Oswego and Fox River Valley Railroad Company or to the person or persons having power and authority other certificates of stock—said certificate for $60,000 *dollars*
of stock—and have issued in lieu thereof other certificates,
8 in such sums as will enable it to assign and set over to your orator six thousand dollars thereof, being the amount represented by said bonds held by your orator; and that said railroad company and its officers be ordered, adjudged, and decreed to issue new certificates upon the surrender of said certificate for $60,000 of said stock, in such sums as will enable said town to turn over to your orator shares representing a sum equivalent to the bonds held by your orator as aforesaid; and that your orator may be decreed to be the legal and equitable owner of so many shares in said railroad company as are represented by the bonds held by your orator, or that said Ottawa, Oswego and Fox River Valley railroad or its proper officers may be ordered and directed to cancel so much of said certificate for $60,000 stock in said company held by said town as stands for and represents the bonds held by your orator, to wit, $6,000, par value thereof, and to issue to your orator in lieu thereof a certificate for $6,000, par value of said stock, upon surrender of said bonds.

And that your orator may have such other and further relief in the premises as to your honors may seem just and equitable.

And your orator will ever pray, &c.

GEORGE A. SANDERS,
Sol'r for Compl't.

THOMAS S. McCLELLAND, *Of Counsel.*

Endorsed: Filed May 18, 1885. Wm. H. Bradley, clerk.

9 Afterward, to wit, on the first day of June, 1885, came the Ottawa, Oswego and Fox River Valley Railroad Company and the Chicago, Burlington and Quincy Railroad Company, by their solicitors, and filed in said clerk's office their appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois. }

In the Circuit Court of the United States for the Northern District of Illinois.

O. MASON
vs.
THE TOWN OF AURORA, THE OTTAWA, OSWEGO AND Fox River Valley Railroad Company, and The Chicago, Burlington and Quincy Railroad Company. } In Chancery.

We hereby enter the appearance of the Ottawa, Oswego and Fox River Valley Railroad Company and the Chicago, Burlington and Quincy Railroad Company, defendants in the above-entitled cause.

DEXTER, HERRICK & ALLEN,
Solicitors for said Defendants.

(Endorsed:) Filed June 1, 1885. Wm. H. Bradley, clerk.

10 Afterward, to wit, on the tenth day of August, 1885, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

11 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the Town of Aurora, Kane county, Illinois, impleaded with the Ottawa, Oswego & Fox River Valley Railroad Company *et al.*, Greeting:

We command you again and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of September next, to answer the bill of complaint of O. Mason this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this

tenth day of August, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 110 year.

WM. H. BRADLEY, *Clerk.* [SEAL.]

Memorandum.

The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against it as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

12 I have served the within writ within my district in the following manner, to wit:

Upon the Town of Aurora, Kane Co., Ill., therein named, on the 13th day of August, A. D. 1885, by personally delivering a true copy of the same to T. N. Holden, supervisor of said town.

F. H. MARSH,
U. S. Marshal,
By C. HERTING, *Deputy.*

Marshal's Fees.

1 service	$2 00
1 copy	50
40 miles	2 40
Return	10
	$5 00

Endorsed: Filed Aug. 18th, 1885. Wm. H. Bradley, clerk.

13 Afterward, to wit, on the twenty-eighth day of August, 1885, came the Town of Aurora, by its solicitor, and filed in said clerk's office its appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for said District, July Term, A. D. 1885.

O. MASON
vs.
TOWN OF AURORA *et al.* } In Equity. Bill for Relief.

This 28th day of August, A. D. 1885, comes The Town of Aurora, one of said defendants, by R. G. Montony, its solicitor, and — its appearance in said cause as one of the defendants therein.

R. G. MONTONY,
Solicitor for said Town.

(Endorsed:) Filed Aug. 28, 1885. W. H. Bradley, cl'k.

Afterward, to wit, on the third day of October, 1885, came the Town of Aurora, by its solicitor, and filed in said clerk's office its answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

14 UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court Thereof, to the October Term, A. D. 1885, in Chancery Sitting.

The several answer of The Town of Aurora, in the county of Kane and State of Illinois, one of the defendants, to the bill of complaint of O. Mason, complainant, exhibited against said Town; the Ottawa, Oswego and Fox River Railroad Company, and the Chicago, Burlington and Quincy Railroad Company.

This defendant, The Town of Aurora, reserving to itself all benefit of exception to said bill of complaint, for answer thereunto, answering, says that the complainant is and was at the commencement of this suit a citizen of Massachusetts, and this defendant was and is a body corporate, organized under and by virtue of the laws of the State of Illinois and located in Kane county, in said northern district of Illinois, and the defendants The Ottawa, Oswego and Fox River Valley Railroad Company and The Chicago, Burlington and Quincy Railroad Company were and are both corporations existing under and by virtue of the laws of the State of Illinois, and located in said northern district of Illinois and citizens of said State of Illinois.

This defendant upon information and belief admits that on, to wit, the 21st day of June, 1852, said Ottawa, Oswego and Fox River Valley Railroad Company was duly incorporated under and by virtue of an act of the legislature of the State of Illinois entitled
15 "An act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company," approved June 21st, 1852, and in force August 22d, 1852.

This defendant, further answering, denies that on, to wit, February 18, 1857, or at any other time said legislature of Illinois passed a further act, entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," in and by which act it was provided that any city, county, incorporated town, or any township now or hereafter organized under the township organization laws, which may be situated on or near the route of the Ottawa, Oswego and Fox River Valley Railroad Company, may become subscribers to the capital stock of said company and issue bonds in payment therefor; but this defendant says that at the time of the supposed final passage of said supposed act last named there was a bill, entitled as said supposed act is alleged to have been entitled, pending before the senate of the General Assembly of the State of Illinois for passage, as shown by the journal thereof, but the said journal does not show that said bill was put on its final passage or that any vote or any passage, final

or otherwise, or attempted passage thereof was taken by yeas and nays and entered thereon, or that a majority of the members elected to the senate concurred in any passage or attempted passage thereof, whether final or otherwise, and for that reason said bill never became a law.

This defendant, further answering, admits that on, to wit, April 20, 1869, said legislature passed an act entitled "An act to amend an act entitled 'An act authorizing certain cities, counties,
16 towns, and townships to subscribe to the stock of certain railroads,'" in force Feb. 18, 1857, which said amended act is found in the Private Laws of Illinois of 1869, volumes 3, page 62, as this defendant is informed and believes; but this defendant says, on the advice of counsel, and so believes the fact to be, that the said supposed last-named act is unconstitutional and void.

This defendant, further answering, says that said Town of Aurora, being one of the towns contemplated by said supposed act of February 18, 1857, and in pursuance of the provisions thereof, but not under or in pursuance of the provisions of said act of April 20, 1869, at a special meeting or election held on the 26th day of February, A. D. 1869, for that purpose, voted to subscribe sixty thousand dollars to the capital stock of the said Ottawa, Oswego and Fox River Valley Railroad Company, and in payment therefor to issue its certain sixty bonds of one thousand dollars each, payable at various dates thereafter, to be specified in said bonds; that in pursuance of said supposed act of February 18, 1857, and of the said election or town meeting held under it (but not in pursuance of the said act of April 20, 1869,) the supervisor and town clerk of said town executed and delivered sixty bonds of said town of the denomination of one thousand dollars each, with interest at ten per cent. per annum to the date of their maturity respectively, to the Ottawa, Oswego and Fox River Valley Railroad Company in payment for stock in said Ottawa, Oswego and Fox River Valley Railroad Company of the par value of sixty thousand dollars, which was duly issued and delivered to this defendant in considera-
17 tion of said bonds of said town so delivered to said company, and for which stock said company then issued to this defendant, The Town of Aurora, six certificates of stock, each for one hundred shares, each share at the par value of one hundred dollars, and not one certificate for $60,000, as stated in said bill of complaint.

This defendant, further answering, admits that on, to wit, *on* July 1st, 1869, and before the maturity thereof the complainant became the owner of said bonds numbered 31, 32, 39, 40, 41, and 45, of the par value of $6,000.00, for a good and valuable consideration and without notice of any defence to the same, which said bonds and each of them were duly registered in the office of the auditor of public accounts of said State of Illinois on Oct. 25, 1870, under and in pursuance of an affidavit made and signed by the supervisor of said town Oct. 11, 1870, and filed with said State auditor Oct. 13, 1870.

This defendant, further answering, admits that the said town, sub-

sequent to the purchase of said bonds by the complainant, repudiated the same and refused to pay the same; but this defendant further says that it paid and took up twelve of said one-thousand-dollar bonds, being the first to mature, and paid interest on all those now outstanding for the first two years before the town discovered that said bonds were unauthorized, illegal, and void because the said supposed act under and in pursuance of the provisions of which they were issued *have* never become a law, and that there was no authority for the issuance thereof, as above answered; that in Ryan *vs.* Lynch, 68 Ill., 160, at the — term of the supreme court, 187–, and in Miller *vs.* Goodwin, 70 Ill., 659, at the —, 187–, that court held that the supposed act under which said bonds
18 purport to have been issued never had become a law, and that there was no authority conferred by law for the issuance of said bonds, and that no taxes could be collected to pay them, and that all such levies were illegal. Those suits were instituted by a few heavy tax-payers against the collectors for an injunction, which was granted and made perpetual by the decrees of the circuits in which the causes were brought and subsequently affirmed by the Supreme Court on appeal; that afterwards, as alleged in said bill, at the October term, A. D. 1876, the Supreme Court of the United States, in the suits of the Town of Ottawa against Perkins and the Supervisors of Kendall County against Post, held and adjudged that said supposed act of February 18, 1857, was never legally and constitutionally passed, and that the bonds issued in pursuance thereof were void; that at the October term, A. D. 1881, the Supreme Court of the United States affirmed its opinion in said cases in the suits of Post *vs.* Supervisors and Amoskeag Bank *vs.* Ottawa, reported in 105th vol. of the United States Reports, at page 667; that said cases of Town of South Ottawa *vs.* Perkins and Supervisors of Kendall County *vs.* Post are reported in vol. 94, United States Reports, page 260.

This defendant also admits that at the July term, 1880, of the said circuit court of the United States for the northern district of Illinois the complainant instituted a suit against this defendant for the purpose of recovering judgment on said bonds; that said cause came on to be heard before the Hon. J. M. Harlan, associate justice of the Supreme Court of the United States, on June 14th, 1883, and judgment was rendered against the complainant for costs, the court holding that said bonds were void under and by virtue of the rulings of said Supreme Court above set forth.

19 This defendant further says that in this last-named case the plaintiff relied also upon said act of April 20, 1869, as being proper and sufficient authority for the issuance of said bonds, but the court held that said act was no authority for their issuance, and that said bonds were void notwithstanding said act of April 20, 1869.

This defendant admits that the complainant has been unable to realize anything on said bonds, with this qualification: that the interest for the first two years after their issuance was paid by the town to the holder of them, as above answered.

This defendant, further answering, says that at the annual town meeting of said town of Aurora, duly convened according to law, at the city hall, in said town, in the county of Kane and State of Illinois, when, the hour of two o'clock in the afternoon having arrived and the general business of the town being in order, the polls were closed for one hour, and the electors present, in town meeting assembled, adopted the following preamble and resolution, viz:

"Whereas the town of Aurora, in the county of Kane, Illinois, is the owner of six thousand shares of the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, in payment of which stock the town issued its bonds, forty-eight thousand dollars of which remain in the hands of *bona fide* purchasers unpaid:

"Be it therefore resolved, That the supervisor be, and he is hereby, authorized and instructed to exchange so much of said stock, dollar for dollar (excluding interest on said bonds), as shall be necessary to take up all said bonds outstanding, and to make the proper transfer of said stock on the books of said company or otherwise in carrying out said exchange."

20 This defendant, further answering, says that Thomas O'Donnell, supervisor of said town of Aurora, soon after the passage of said preamble and resolution went to the proper officers of said Ottawa, Oswego and Fox River Valley Railroad Company, at their offices in Chicago, Illinois, and informed them of the action of said town in passing said resolution and presented to them the said certificates of stock, and requested the proper officers to receive the same and issue to him certificates in the sum of one thousand dollars each in the place thereof, so as to enable the town to make the exchange with those holding said bonds, but the said officers refused to accept a surrender of said certificates from him or any of them and give him in lieu thereof certificates of one thousand dollars each or of any other amount of stock for the amount surrendered, they claiming and pretending to him that said stock so issued to said town was illegal and void, because the bonds were void which were issued by said town in payment of said stock, and that the town of Aurora had not in fact paid for the bonds, but refused so to do, and that the town therefore had no right as against the said railroad company, in law or equity, to said stock.

This defendant says that all such claims and pretenses on the part of said railroad company that said company was not fully paid for said stock are not true, because the said railroad company either applied said bonds in payment to the extent of the amount thereof for the construction of the railroad of said company or the bonds were sold by the proper officers and agents of the company and the proceeds arising from the sale of said bonds were used in the construction of its railroad, and that said railroad company has never been called upon nor can it be successfully called upon to

21 repay to the holders of said bonds the amount it received for them, for the company did not endorse them or guarantee their validity or that they would ever be paid. The purchasers took them at their own risk. The purchasers had the same facilities, to wit, access to the journal of the senate, in the office of the

secretary of state, to ascertain whether the bill was legally and constitutionally passed or not, as the company had. It was a mistake of law and not of fact, and so the Supreme Court of the United States held in the cases cited. Had it been a mistake of fact and not of law, then the bonds would have been valid in the hands of *bona fide* purchasers for value; but it was a mistake of law, and the law presumes all to know the law or to have equal facilities for knowing it, which is the same thing in the contemplation of the law, as this defendant is advised by its counsel and so believes the fact to be.

This defendant is advised and believes and so states, for the reasons aforesaid and for others, that the refusal of the proper officers to make stock transfers on the company's books is unjust, inequitable, and contrary to their duty towards the stockholders of said company (whose agents they are)—in refusing the request of the supervisor to issue in place of the certificates held by the town others of smaller amounts, in order that he might execute the resolution of said town.

In view of the refusal of said company, as aforesaid, the town electors of the town of Aurora, in town meeting assembled, on the first Tuesday in April, 1884, at 2 o'clock p. m. of said day, adopted the following preamble and resolution, viz:

"Whereas at the last town meeting the supervisor was authorized to exchange so much of the stock owned by the town in the Ottawa, Oswego and Fox River Valley Railroad Company, dollar for
22 dollar, for the bonds issued by the town for said stock (exclusive of interest on said bonds) as shall be necessary to take up all said bonds outstanding and make the proper transfer of said stock on the books of said company or otherwise in carrying out said exchange, and whereas the proper officers of said railroad company, on application of the supervisor, have refused and do refuse to make such transfer, claiming and pretending said stock to be illegal and void:

"Therefore resolved, That the supervisor be, and is hereby, authorized and required to take such proceedings as shall be necessary to effect such transfer of said stock and establish the legality thereof."

And this defendant avers that the said town, by its proper officer, has been at all times ready and willing and is now ready and willing and offers to execute said resolution by exchanging of said stock, to wit, sixty shares for said six bonds so owned by complainants, and have been prevented from doing so by the refusal aforesaid of the proper officers of the said Ottawa, Oswego and Fox River Valley Railroad Company to accept of the surrender of one of the said certificates and issue others instead, as aforesaid.

This defendant says it is advised by counsel and so believes the fact to be that it is wholly immaterial to the relief prayed for in the complainant's bill whether the Ottawa, Oswego and Fox River Valley Railroad Company and its lines are now in possession and control of the Chicago, Burlington and Quincy Railroad Company or not, or whether such possession and control is under a lease or otherwise, and therefore this defendant declines to make any an-

swer to the allegation, neither admitting nor denying it, because of such immateriality.

23 And this defendant denies all and all manner of unlawful combination wherewith it is by said bill charged, without this, that if there is any other matter, cause, or thing in the bill of complaint material or necessary for it to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is willing and ready to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

TOWN OF AURORA,
By R. G. MONTONY,
Its Solicitor.

R. G. MONTONY, *Of Counsel.*

Endorsed: Filed Oct. 3, 1885. Wm. H. Bradley, clerk.

Afterward, to wit, on the twenty-third day of November, 1885, came The Ottawa, Oswego and Fox River Valley Railroad Company, by its solicitors, and filed in said clerk's office its answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

24 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for said District.

O. MASON, Complainant,
vs.
THE OTTAWA, OSWEGO & FOX RIVER VALLEY RAILROAD COMPANY, Defendant. } In Chancery.

The answer of The Ottawa, Oswego & Fox River Valley Railroad Company, the defendant, to the bill of complaint of O. Mason, complainant.

This defendant, now and at all times hereafter saving and reserving to itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereunto or to so much thereof as this defendant is advised is or are material or necessary for it to make answer unto, answering, says—

That it does not know of what State complainant is a citizen or resident; that it admits the town of Aurora is a municipal corporation existing under the laws of this State, and that it admits that on, to wit, the 21st day of June, 1852, this defendant was duly incorporated under and by virtue of an act of the legislature of the State of Illinois, entitled "An act to incorporate the Ottawa, Oswego

& Fox River Valley Railroad Company," approved July 21, 1852, and in force August 22, 1852, and for greater certainty this defendant refers to said act.

That it admits that on February 26, 1869, the said town of
25 Aurora, under the supposed authority of said alleged act of February 18, 1857, entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to stock of certain railroads," at a special meeting or election called for that purpose, voted to subscribe $60,000 to the capital stock of this defendant, and in payment therefor to issue its certain sixty bonds of $1,000 each.

That afterwards, on, to wit, the 1st day of May, 1869, under the supposed authority of said act of February 18, 1857, and of said vote, the supervisor and town clerk of said town executed and delivered the sixty bonds, purporting to be the bonds of said town, of the denomination of $1,000 each, and the president and secretary of this defendant issued therefor six certificates in the name of said town, purporting to be certificates of stock of this defendant, each of said certificates purporting to be of the par value of $10,000, and that said town has ever since held and now holds all of said certificates, and this defendant avers and insists that neither this defendant nor its officers nor agents had any power or authority whatsoever under its charter or by-laws or otherwise to issue the said alleged certificates of stock, and that the said Town of Aurora had no power or authority to enter into said pretended contract of subscription to the stock of this defendant, and this defendant denies that complainant purchased said alleged bonds, as set forth in said bill, for a good and valuable consideration or without notice of any defenses to the same.

And this defendant admits that thereafter the said town successfully repudiated the said bonds alleged to have been pur-
26 chased by the complainant on the ground that said act of 1857 never became a law, and that the said subscription to the stock of this defendant, in payment of which said bonds were issued, was unauthorized by law and void, and refused and has ever since refused to pay the said bonds.

And this defendant admits that at the October term, A. D. 1876, the Supreme Court of the United States, in the said suits of The Town of South Ottawa *vs.* Perkins and Supervisor of Kendall County *vs.* Post, held and adjudged that said alleged act of February 18, 1857, never became a law, and that said alleged bonds issued in pursuance thereof were void; that at the October term, A. D. 1881, said Supreme Court affirmed its opinion in said cause in the suits of Post *vs.* Supervisors and The Amoskeag Bank *vs.* Ottawa, reported in the 105th volume of the United States Reports, at page 667, and that said cases of Town of South Ottawa *vs.* Perkins and Supervisor of Kendall County *vs.* Post are reported in volume 94, U. S. Reports, page 260.

This defendant, further answering, admits on information and belief that at the July term, A. D. 1880, the said circuit court of the United States for said northern district of Illinois complainant insti-

tuted a suit against said Town of Aurora for the purpose of recovering on said bonds; that said cause came on to be heard before the Honorable J. M. Harlan, associate justice of the Supreme Court of the United States, on June 14, 1883, and judgment was rendered against the complainant for costs, the court holding that said bonds were void under and by virtue of the rulings of said Supreme Court above set forth.

27 This defendant, further answering, admits on information and belief that the complainant, has been wholly unable to realize anything from said town on said alleged bonds, but this defendant denies that the complainant as the alleged owner and holder of $6,000 of said bonds, is entitled to an equivalent amount or any amount of the stock of this defendant.

This defendant, further answering, avers that the said subscription to the capital stock of this defendant and the alleged issue of bonds therefor having been adjudged void and the said town having by reason thereof successfully repudiated the said bonds, the said alleged stock issued in pursuance of the supposed authority of said act of 1857 and in pursuance of said subscription was and is wholly void.

This defendant, further answering, denies that the complainant is or should be decreed to be the equitable owner of any shares of stock of this defendant, or that he is entitled to have issued to him a certificate for $6,000 par value of the stock of this defendant or for any amount of said stock.

And this defendant sets up and insists that if the complainant ever had any cause of action or suit against this defendant concerning any of the matters in said bill of complaint contained, which this defendant does not in anywise admit, such cause of action did not occur or arise within five years before said bill was filed, and this defendant prays the same benefit of this defense as if it had pleaded the same.

This defendant, further answering, sets up and insists that if the complainant ever had any cause of action or suit against
28 this defendant, which this defendant does in nowise admit, the said complainant has been guilty of laches and is therefore now barred from asserting such pretended cause of action or suit against this defendant.

And this defendant submits to this honorable court that all and every the matters in said bill of complaint contained complained of are matters which may be tried and determined at law and with respect to which said complainant is not entitled to any relief from a court of equity, and this defendant prays the same benefit of this defense as if it had demurred to said bill.

And this defendant denies all and all manner of unlawful combination and confederacy with which it is by said bill charged; without this, that there is any other matter, cause, or thing in said complainant's bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied is true to the knowledge or belief of this defendant; all which matters

and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY,
By DEXTER, HERRICK & ALLEN, *Its Solicitors.*

WIRT DEXTER,
JOHN J. HERRICK,
Of Counsel.

Endorsed: Filed Nov. 23, 1885. Wm. H. Bradley, clerk.

29 Afterward, to wit, on the third day of December, 1885, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of the Town of Aurora — Ottawa, Oswego and Fox River Valley Railroad Company in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, } ss:
Northern Dist. of Illinois, }

In Chancery.

In the Circuit Court of the United States, Nor. Dist. of Ills., of the October Term, A. D. 1885.

The replication of O. Mason, complainant, to the answer of the Town of Aurora, Ottawa, Oswego and Fox River Valley Railroad Company.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that he do- and will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants — very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not
30 herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

THOS. S. McCLELLAND,
GEO. A. SANDERS,
Solicitors for Complainant.

(Endorsed:) Filed this 3d day of Dec., 1885. Wm. H. Bradley, clerk.

31 Afterward, to wit, on the fourteenth day of January, 1889, in the December term of said court, 1888, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

O. MASON
vs.
THE TOWN OF AURORA *et al.* } In Chancery.

Now come the parties, by their solicitors, and, on motion of Thomas S. McClelland, Esq, the defendant railroad company is ruled to close its proofs herein by the first day of April next.

Afterward, to wit, on the sixteenth day of July, 1889, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

32 In the Circuit Court of the United States, Northern District of Illinois.

O. MASON
vs.
O., O. AND F. R. V. R. R. CO. AND TOWN OF AURORA.

It is hereby stipulated between the parties to the above cause that said cause shall be submitted to the court under the issues made by the pleadings for hearing and decree on the following evidence offered on behalf of the complainant:

(1.) Certificates of stock of the Ottawa, Oswego and Fox River Valley Railroad Company to the Town of Aurora, Nos. 60, 61, 62, 63, 64, and 65, all dated the fourth day of May, 1869, each for one hundred shares of the capital stock in said railroad company, of the par value of one hundred dollars a share.

It is stipulated that all of said certificates are in the same form except the number, and that a copy of certificate No. 60 may be read in evidence in place of the originals of said certificates. Said copy of No. 60 is as follows:

33 No. 60. Shares $100 each. 100 shares.

Ottawa, Oswego and Fox River Valley Railroad Company.

Capital stock, $1,000,000.

This certifies that the Town of Aurora is entitled to 100 shares of the capital stock of the Ottawa, Oswego & Fox River Valley Railroad Company, transferrable only on the books of the said company, at their office in Ottawa, by —— —— or — attorney on the return of this certificate.

In witness whereof the president and secretary thereof have hereunto subscribed their names and affixed the seal of said company, at Ottawa, the 4th day of May, 1869.

W. BUSHNELL, *President.*

D. F. CAMERON, *Secr't'y.*

[Stamp and seal.]

This certificate not valid unless countersigned by ——

(On the back:)

Usual blank power of Attorney.

34 (2.) Also six bonds of the town of Aurora for the sum of one thousand dollars each, dated May first, 1869, and numbered 31, 32, 39, 40, 41, and 45, as the property of the complainant. Each of said bonds, except as to their numbers, *are* in the words and figures as bond 31, which is as follows:

No. 31. $1,000.

UNITED STAES OF AMERICA, *State of Illinois: Ten per Cent. Bonds, Town of Aurora.*

The Town of Aurora, in the county of Kane, State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said Town of Aurora promised to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, six years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said town is hereby irrevocably pledged.

This bond is one of a series of sixty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to sixty, inclusive, and is issued in pursuance of an election or special town meeting held in said town on the 26th day of February, A. D. 1869, under and by virtue of a certain act of the legisture of the State of Illinois, approved February 18th, 1857, entitled

"An act authorizing certain cities, counties, incorporated
35 towns, and townships to subscribe for the stock of certain railroads," the said act having special reference to the said

Ottawa, Oswego and Fox River Valley Railroad Company, at which election or special town meeting a majority of the legal holders participating at the same voted "for subscription" to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company in the sum of $60,000, and to issue the bonds of said town therefor, and the said election or special town meeting specifying the amount to be subscribed and the conditions of such subscriptions having been made to the clerk of said town and the said town clerk having called said election or special town meeting in accordance therewith, and having given due notice of the time and place of holding the same as required by law and the act aforesaid.

In witness whereof the supervisor and town clerk have hereunto set their hands and seals this first day of May, A. D. 1869.

(Signed) CHARLES WHEATON, [SEAL.]
Supervisor.
MICHAEL LIESE, [SEAL.]
Town Clerk.

($ 50 stamp.)

(Across the body of the bond, printed in green letters, is the following:)

One thousand dollars.

(On the back of said bond is the following:)

"AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *October 25th*, 1870.

I, Charles E. Lippincott, auditor of public accounts, in the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an 36 act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, 1869.

In testimony whereof I have hereunto subscribed my [SEAL.] name and affixed the seal of my office the day and year aforesaid.

(Signed) C. E. LIPPINCOTT,
Auditor, P. A."

(3.) Also the proceedings of the town of Aurora, meeting held Tuesday, April 3rd, 1883, and also the proceedings of a meeting held in said town on Tuesday, April first, 1884, as follows:

Proceedings of the annual town meeting of the town of Aurora, county of Kane and State of Illinois, held at the city hall, in the city of Aurora, in said town, county, and State, on Tuesday, the 3rd day of April, A. D. 1883.

The meeting was called to order by the town clerk.

On motion of Holmes Miller, George W. Quereau was elected moderator, who, being first duly sworn by the town clerk, entered upon the duties of his office.

The hour of two o'clock in the afternoon having arrived and the general business of the town being in order (the following, among other, proceedings *was* had):

Judge R. G. Montony presented the following resolutions, which were, on his motion, adopted:

Whereas the town of Aurora, in the county of Kane, Illinois, is the owner of six hundred shares of the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, in pay-
37 ment of which stock the town issued its bonds, forty-eight thousand dollars of which remain in the hands of *bona fide* purchasers unpaid, be it therefore resolved that the supervisor be and hereby is authorized and instructed to exchange so much of said stock, dollar for dollar (excluding interest on said bonds), as shall be necessary to take up all said bonds outstanding and to make the proper transfer of said stock on the books of said company or otherwise in carrying out said exchange.

Resolved, That the supervisor be and he is hereby authorized to vote for and in the name of the said town of Aurora said stock at any and all stockholders' meeting and otherwise represent the interest of said town in said stock at such meetings while the town continues to own said six hundred shares or any part thereof.

STATE OF ILLINOIS, } ss:
Kane County, Town of Aurora, }

I, J. M. Kennedy, town clerk of the town of Aurora aforesaid, do hereby certify that the above is a true copy of proceedings had at the annual town meeting held April 3rd, A. D. 1883, as recorded in the town record book, and that I am entrusted with the safe keeping of the original of which the above is a true and correct copy.

Witness my hand this 12th day of October, A. D. 1887.

J. M. KENNEDY,
Town Clerk.

38 Proceedings of the annual town meeting of the town of Aurora, Kane county, State of Illinois, held in the city hall, in said town, county, and State, on Tuesday, April 1st, 1884.

The meeting — called to order by the town clerk.

On motion of Theo. Howard, Amos C. Graves was elected moderator, who, being first duly sworn by the town clerk, entered upon the duties of his office.

The polls for the election of officers were opened, proclamation thereof being first duly made by the moderator.

The hour of two o'clock in the afternoon having arrived and the general business of the town being in order, the polls of the election were closed for one hour.

When the following, among other, proceedings *was* had:

Holmes Miller presented the following, and moved the passage of the accompanying resolution: Whereas at the last town meeting

the supervisor was authorized to exchange so much of the stock owned by the town in the Ottawa, Oswego and Fox River Valley Railroad Company, dollar for dollar, for the bonds issued by the town aforesaid for said stock (exclusive of interest on the bonds) as shall be necessary to take up all said bonds outstanding, and to make the proper transfer of said stock on the books of said company or otherwise in carrying — said exchange;

And whereas the proper officers of said railroad company, on application of the supervisor, have refused and do refuse to make such transfer, claiming and pretending said stock to be illegal and void; therefore—

Resolved, That the supervisor be and is hereby authorized
39 and requred to take such proceedings as shall be necessary to effect such transfer of said stock and establish the legality thereof.

Motion carried and resolution passed.

STATE OF ILLINOIS, }
Kane County, Town of Aurora, } *ss:*

I, J. M. Kennedy, town clerk of the town of Aurora aforesaid, do hereby certify that the above is a true copy of proceedings had at the annual town meeting held April 3rd, A. D. 1883, as recorded in the Town Record Book, and that I am entrusted with the safe keeping of the original of which the above is a true and correct copy.

Witness my hand this 12th day of October, A. D. 1887.

J. M. KENNEDY,
Town Clerk.

(4.) Also the depositions on file of Ralph Plumb and William H. Miller, including the further cross-examination of Ralph Plumb.

Depositions of Ralph Plumb and Wm. H. Miller, Taken on the 23rd Day of November, 1886, Before Wallace H. Ryon, Special Commissioner, at Streator, in the County of La Salle, Illinois.

40 Q. State your name, age, occupation, and place of residence.

A. My name is Ralph Plumb; age, 70; occupation, banker and manufacturer; I reside at Streator, Illinois.

Q. State whether you know the parties to this suit or either of them. And, if so, how long have you known them or either of them respectively?

A. I know the defendants, only, in this suit. I have known them for nearly twenty years.

Q. Where did you live and what was your occupation and where did you do business in year A. D. 1869?

A. I lived in Streator and did business there. My occupation was railroad building.

Q. Had you anything to do with or did you take part in the organization and construction of the Ottawa, Oswego and Fox River Valley railroad? If so, state fully your connection therewith; state

what relations you held to that road; give the termini, and state whether or not it was constructed through The Town of Aurora, defendant in this case.

A. I took no part in the organization of the Ottawa, Oswego and Fox River Valley Railroad Company, but was engaged in constructing said road as a contractor, being one of the firm of C. H. Force & Co., under a contract first made to other parties and subsequently assigned to C. H. Force & Co., who completed the road. The contract for building in which I was interested commenced at Streator, in La Salle county, and terminated at Geneva, in Kane county, passing through the town of Aurora.

Q. Do you know anything about any subscription to the capital stock of that railroad by the town of Aurora in aid of its construction; and, if any such subscription was made, do you know how it was paid for? If so, state the same in full.

41 A. The town of Aurora voted bonds to the amount of $60,000 to aid in the construction of the said railroad. These bonds were delivered to the contractors from time to time as the work progressed. By the terms of the contract under which this road was constructed the railroad company, among other things, delivered to the contractors its capital stock to the amount of $15,000 or $16,000 per mile, which stock was in accordance with the same agreement turned over to the town of Aurora for the bonds before referred to.

Q. The bill filed in this cause sets forth, in substance, among other things, that on or about February 26, 1869, at an election called in the town of Aurora the electors of that town voted to subscribe for sixty thousand dollars of the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company and to pay for the same to execute and deliver sixty thousand dollars of the bonds of the town; that sixty bonds of the denomination of $1,000 each were duly issued by the town of Aurora, bearing interest at ten per centum per annum, and delivered to the railroad company aforesaid, and received therefor an equal amount of the capital stock of said company; that the bonds thus delivered to the railroad company were turned over by it to the construction company which built the road and in part payment therefor and afterwards sold by the construction company. State in full all you know about the issue, delivery, and sale of these bonds, and state in detail your connection therewith and whether or not the matters and things stated by you came within your personal knowledge and observation.

State all you know regarding the subscription made by the
42 town of Aurora to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, if any such subscription was made. Give dates, amounts, and how much subscription was paid, if you know, and all the facts relating thereto.

A. I cannot state positively the date of the election held in Aurora referred to in this interrogatory, but believe it was on or about the time named. The other allegations contained in the bill referred to in this interrogatory are true. The bonds were issued in accordance with the vote of the people of the town. They were

turned over to the construction company that built the road in part payment therefor in exchange for the stock of the said railroad company. These $60,000 worth of bonds were placed in the hands of Mix and Miller, bankers, at Aurora, by the contractors and were sold by said bankers to parties unknown to this affiant. Said bonds were delivered by this affiant, who was actively and personally engaged in the construction of the road, in the exchange of the stock of the said railroad company for the town bonds of the town of Aurora. Affiant has no personal knowledge of the formal subscription of the town of Aurora to the capital stock of the "Ottawa, Oswego and Fox River Valley R. R. Co." other than that the bonds — voted by the said town to aid in the construction of the said railroad.

Q. State all you know about the issue of bonds by the town of Aurora in aid of that railroad company and for payment of stock in the same, if such bonds were issued. Give dates, amounts,
43 to whom the bonds were delivered, and by whom sold and for what amounts; and state, if you know, to what use the money arising from the sale of the bonds was put. State all the facts.

A. Affiant has already given what information he possesses in reference to the issue of the bonds referred to in this interrogatory and, not having present access to the books of the construction company or of the railroad company, cannot give the dates at which the bonds were delivered, but, as near as can now be recollected, said bonds were sold at about ninety-four cents on the dollar. The money arising from the sale of these bonds was used in paying for materials, labor, right of way, and other expenses incurred by the contractors in building said railroad.

Q. State fully any other matter or thing regarding the controversy in this suit as if you were specially interrogated thereto.

A. This affiant has no interest in this suit.

Cross-Interrogatories to be Propounded on Behalf of said Town of Aurora to Ralph Plumb.

Q. State, if you know, whether the railroad of the Ottawa, Oswego & Fox River Valley Railroad Company was constructed under a contract with a construction company for the construction of said road. If so, when was the contract made and who were the
44 parties to it? State also (if you know) the terms of the contract or the substance thereof, especially how or in what the construction company were to be paid for the construction of the road and whether it was so paid; also who has the contract. If you have it in your possession or power will you attach the same or a copy thereof, to be made by the commissioner, to your deposition? Also whether when the stock was issued by the railroad company to the town of Aurora it belonged to the construction company or railroad company, and, if it belonged to the construction company, how did the latter pay the railroad company for it (if at all); also whether the town delivered the bonds to the construction company or to some one else for it in payment of said stock; and also when

(if at all) the construction company completed the construction of said railroad and when it was accepted by the railroad company from the construction company.

45 A. The railroad of the Ottawa, Oswego and Fox River Valley R. R. Co. was constructed under a contract with the construction company made in 1869 between the "Ottawa, Oswego and Fox River Valley R. R. Co." and Oliver Young, by whom it was assigned to Kellogg, Noble & Co., who assigned it to C. H. Force and Co., of which latter firm affiant was a member. By the terms of this contract the contractors were to receive $16,000 per mile in the bonds of the road and $15,000 or $16,000 per mile in the shares of stock of said company, it being agreed that the said contractors should deliver to the various municipalities and other subscribers to the stock of the road so much in the shares of the company as would be required at par to equal the amount so subscribed or voted by the towns and individuals who had given their bonds and notes to aid in the construction of said road. Affiant has not now in his possession the contract for construction above referred to. The stock was issued by the railroad company directly to the town of Aurora at the request of the contractors and in accordance with the construction agreement. All of the stock issued by the railroad company to the contractors was in payment for the construction of the railroad by the contractors. The bonds of the town of Aurora were delivered to the construction company in accordance with the terms of the contract between the railroad company and the construction company.

Affiant further says that the contract of the Ottawa, Oswego and Fox River Valley R. R. Co. was completed by the first day of January, 1871, and very soon afterwards the road was occupied and fully equipped by the Chicago, Burlington and Quincy R. R. Co. under a lease executed to the latter by the directors of the Ottawa, Oswego and Fox River Valley R. R. Co.

RALPH PLUMB.

46 *Testimony of Wm. H. Miller.*

Q. State your name, age, occupation, and place of residence.

A. Name, W. H. Miller; age, 52 years; occupation, bank cashier; residence, Streator, Ills.

Q. State whether you know the parties to this suit or either of them; and, if so, how long have you known them respectively?

A. I know of the defendants; lived in the township of Aurora from 1842 to 1873; know of the Fox River Valley R. R. Co. from the commencement of the construction of its line of road.

Q. Where did you live and what was your occupation and where did you do business in year A. D. 1869?

A. Lived in the city of Aurora and was in the banking business there.

Q. Had you anything to do with or did you take part in the organization and construction of the Ottawa, Oswego and Fox River Valley railroad? If so, state fully your connection therewith; state

what relations you held to that road; give the termini, and state whether or not it was constructed through the town of Aurora, defendant in this case.

A. Had nothing to do with the organization of the company and took no part in the construction of the road. The termini were understood by me to be Geneva, in Kane county, and Wenona, in Marshall county. The road was constructed through the town of Aurora.

Q. Do you know anything about any subscription to the capital stock of that railroad by the town of Aurora in aid of its construction, and if any such subscription was made do you know how it was paid for? If so, state the same in full.

47 A. I do know of such subscription to capital stock and how it was paid for. It was done by the issue of bonds by the town of Aurora to an amount equal to its subscription to the capital stock of the company.

Q. The bill filed in this cause sets forth, in substance, among other things, that on or about February 26, 1869, at an election called in the town of Aurora the electors of that town voted to subscribe for sixty thousand dollars of the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company and to pay for the same to execute and deliver sixty thousand dollars of the bonds of the town; that sixty bonds of the denomination of $1,000 each were duly issued by the town of Aurora, bearing interest at ten per centum per annum, and delivered to the railroad company aforesaid and received therefor an equal amount of the capital stock of said company; that the bonds thus delivered to the railroad company were turned over by it to the construction company which built the road and in part payment therefor and afterwards sold by the construction company. State in full all you know about the issue, delivery, and sale of these bonds, and state in detail your connection therewith and whether or not the matters and things stated by you came within your personal knowledge and observation; state all you know regarding the subscription made by the town of Aurora to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, if any such subscription was made; give dates, amounts, and how much subscription was paid, if you know, and all the facts relating thereto.

A. I do know of my own personal knowledge that the statement set forth in the bill filed in this cause and reiterated in this
48 interrogatory is true. I know personally of the delivery of the bonds and of the issue of the stock to the town of Aurora in accordance with the vote at the election referred to, in which I took an active part. The firm of Mix & Miller, bankers, of which firm I was a member, purchased the bonds of C. H. Force & Co., contractors for the construction of the road. I have no data about me from which to give exact date of election and issue of bonds and stock, but it was about the date given in the interrogatory, and the subscription was for sixty thousand dollars and the bonds issued for the same amount.

Q. State all you know about the issue of bonds by the town of Aurora in aid of that railroad company and for payment of stock in the same, if such bonds were issued. Give dates, amounts, to whom the bonds were delivered, and by whom sold and for what amounts, and state, if you know, to what use the money arising from the sale of the bonds was put. State all the facts.

A. The answers to this interrogatory are embodied in the answer to interrogatory number 6. The money was used in the construction of the road, for the bonds were delivered to the contractors only as fast as the work of construction progressed, upon estimates of the engineer of the road of work done, certified by a citizen appointed by the town.

49 Cross-interrogatories to be answered by Ralph Plumb and W. H. Miller, witnesses to be produced and examined under a commission to be issued in pursuance of a notice heretofore served in the case therein mentioned and now pending in the circuit court of the United States for the northern district of Illinois, wherein O. Mason is complainant and The Town of Aurora and The Ottawa, Oswego & Fox River Valley Railroad Company are defendants, said cross-interrogatories being on the part of and in behalf of the said defendant, The Ottawa, Oswego & Fox River Valley Railroad Co.

Cross-int. If in answer to the direct interrogatories you state that any of the said bonds of the town of Aurora were turned over by said railroad company to the construction company which built the defendant's road or to any other person, state whether the agreement or agreements, if any, under which this was done were in writing.

A. To the best of my recollection the bonds were delivered pursuant to agreement made in writing.

C. I. If in answer to the direct interrogatories you testify that any of said bonds were sold, state whether you personally made any sale or sales of such bonds; and, if so, state the dates and amounts of such sales, by whom, and the names of the purchasers at such sales so far as you can.

A. All of said bonds were sold by the construction company to the firm of Mix & Miller, bankers, of Aurora, and by them resold. Among the purchasers from them I can remember the fol-
50 lowing: Dan'l J. Pike, of Aurora; the First National Bank of Aurora, Rev. —— Burton, of Cleveland, Ohio; cannot name them all.

C. I. If you testify that any of the said bonds were sold by any person or persons other than yourself, state whether you have a personal knowledge of any such sale or sales, giving your personal connection therewith and the dates, amounts, and names of purchasers so far as you have a personal knowledge of the same.

A. Fully answered, I think, in foregoing answers.

C. I. If you testify in answer to the direct interrogatories that any of the money arising from a sale of said bonds was expended in the construction of said road, state by whom, to your personal

knowledge, any such expenditures were made, giving the particular purposes for which the same were made and the names of the persons to whom paid and the dates and amounts, so far as you can.

A. Expenditures were made by C. H. Force & Co. in the construction of the road; cannot particularize as to names of persons to whom money was paid.

C. I. Have you any interest, directly or indirectly, in any claim to a lien on or any interest in any stock of the Ottawa, Oswego and Fox River Valley Railroad Company or growing out of any municipal bonds issued in aid of said railroad company or any sale of such bonds? If so, state the particulars of the same.

A. Am not aware that I have any interest, directly or indirectly, in any claim to a lien on or any interest in any stock of said railroad company or growing out of any municipal bonds issued in aid of said railroad company or any sale of such bonds.

WM. H. MILLER.

51 *Further Cross-Examination of Ralph Plumb, by Stipulation, Before Isaac S. Dement, Chicago, July* 1, 1889.

RALPH PLUMB, being first duly sworn, was further cross-examined by Mr. HERRICK, and testified as follows:

Q. In your former examination you referred to a certain contract for the construction of the Ottawa, Oswego and Fox River Valley railroad. Was that contract in writing?

A. It was.

Q. Who were the parties to the original contract?

A. The contract was made between the Ottawa, Oswego & Fox River Valley Railroad Company and Oliver Young.

Q. Was that contract subsequently assigned; and, if so, to whom?

A. It was subsequently assigned to Kellog, Noble & Co. and by subsequent assignments to C. H. Force & Co.

Q. Do you remember the date or about the date of the assignment to C. H. Force & Co.?

A. I think it must have been in 1869, but the month is more than I can tell without having the papers to refresh me.

Q. Have you any original papers?

A. Not with me.

Mr. MONTONY: Are those papers extant?

A. My best recollection is that I have a copy of the original contract up to my office.

Mr. HERRICK: And of the assignment?

A. I think I have. I have not seen them for so long I might be mistaken about it, but that is my recollection.

Mr. MONTONY: So far as representing the town is concerned, I would be willing to have him present that for the original, if he says it is a copy.

Mr. HERRICK:

Q. Will you please attach copies of that contract and assignments as exhibits to your deposition?

A. I attach (marked Exhibit A) a copy of the different assignments of the contract. The first assignment contains a copy
52 of the original contract between the company and Oliver Young.

Q. Please examine this paper I show you, which purports to be a copy of said contract and certain assignments of it, and state whether the date of the assignment by John S. Noble to Plumb and Force, September 20, 1869, was not the date when C. H. Force & Co. acquired *its* interest in the contract.

A. I believe that to be the date.

Q. As I understand, the contract or agreement which you refer to in the different parts of your former examination was the contract in writing to which I have called your attention?

A. It was.

Q. The municipal bonds which C. H. Force & Co. received were received subsequent to that date, were they not?

A. They were.

Q. Who constituted the firm of C. H. Force & Co.?

A. C. H. Force, William H. W. Cushman, and myself.

Q. Was that firm organized for the purpose of taking an assignment of that contract?

A. It was.

Q. You had no interest in the contract prior to that date?

A. Not any.

Q. You testify that your firm subsequently disposed of these bonds of the town of Aurora. Do you remember about what date you sold them?

A. I cannot tell those dates.

Q. When did the firm of C. H. Force & Co. complete the contract?

A. The first of January, 1871.

Q. And it may have been some time in 1871 that you re-
53 ceived those bonds, may it not?

A. I think the township aid bonds had been received mostly in the year 1870 as the work progressed. They were deliverable as the work progressed, and I think most of them had been received before 1871. Some of them were doubtless received subsequent to that date.

Q. Subsequent to January, 1871?

A. Yes, sir.

Mr. MCCLELLAND:

Q. You mean some of the entire issue?

A. Yes, sir,

Q. Not these specific bonds?

A. No. I cannot tell about these specific bonds, but I know generally about the bonds.

Mr. HERRICK:

Q. There were other towns that made similar subscriptions and issued similar bonds beside the town of Aurora, were they not?

A. There were several.

Q. These bonds were all issued under a similar subscription which was subsequently declared void, were they not?

A. All issued under the same subscription.

Q. That is, they were different subscriptions, but subscriptions made under this same act which was subsequently declared to be no law?

A. What I mean is that there was one law, which was supposed to have been passed by the legislature, authorizing these towns to subscribe, and it was under that law that all of these towns subscribed.

Q. Mention some of the other towns.

A. Town of Kendall, Dayton, Ottawa, South Ottawa, Fox, and Bruce.

Q. In addition to those, as I understand, there were subscriptions to stock by individuals, were they not?

A. There were several.

Q. And on those individual subscriptions stock was issued?

A. Yes, sir.

54 Q. This stock subscribed for by the town of Aurora was issued by the company to the town, was it not?

A. The stock was issued by the Ottawa, Oswego & Fox River Valley Railroad Company to the town of Aurora and all the towns.

Q. This stock was issued, as you understand it, in pursuance of and under the subscription made by the town of Aurora?

A. I do so understand it.

Q. Concurrently with the issue of this stock the town delivered to the railroad company, did it not, the bonds which it had agreed to pay for that stock?

A. It did.

Q. Did Mr. Cushman and Mr. Force make payments to material men and subcontractors from time to time for work done under your contract with the railroad company on behalf of the firm?

A. O, yes.

Q. Sometimes payments were made by you and sometimes by them, as I understand it?

A. As a rule, the payments were made by the treasurer of our construction company, who was Cushman.

Q. But in individual instances?

A. There might have been instances where payments were made by Mr. Force or by myself. I do not now recall any.

Q. Is it not a fact, Mr. Plumb, that some of the municipal bonds received by your firm were sold as late as 1872?

A. I cannot say that I can so recollect. My memory would be that the sale of the bonds was concluded before that date.

Q. They ran along through the year 1871?

A. Some of them, as I have said before, may have been sold as

late as 1871, but it seems to me that the majority of them were delivered to us as the work progressed, and that they had been delivered to us mostly in the year 1870.

55 Q. These bonds you then disposed of to different bankers, did you not?

A. We sold them to various bond-buyers.

Q. You mentioned the firm of Miller & Mix, I believe, in your former examination?

A. Yes, sir.

Q. Did you also sell bonds through other brokers or bond buyers?

A. Yes, sir; we sold them through Brinkerhoff, at Springfield, and, I think, some through Tracy, of Springfield.

Q. From whom did you receive the bonds—your firm of C. H. Force & Co.?

A. Received them from the trustees named in the contract—Kent and Donaldson.

Redirect examination.

By Mr. McClelland:

Q. Do you recollect what year the road was built through the town of Aurora?

A. It was in 1870.

Q. And you received the bonds from these several towns along the line of the road just as fast as the road was built through the towns?

A. As fast as a certain amount of work was completed according to the terms of the contract. The bonds were delivered to us on estimates of the engineer.

Q. Would it be your recollection that if the road was completed through the town of Aurora in the year 1870 the bonds were whol-y issued and delivered within that year or not?

A. I should think so. Of course, I cannot recollect absolutely as to the dates at which those bonds were delivered to us. There were some deliveries I know after the completion of the road or almost deliveries. The town of Batavia, for instance, the bonds were delivered to us quite a good while after the completion of the

56 road, or, rather, they were put in the hands of some one to be delivered to us, but they were anticipated before they were delivered; an injunction prevented their delivery.

Mr. Montony:

Q. They never were delivered for the reason that the town election was called by a deputy instead of by the clerk?

A. Yes; that was the reason they refused to deliver them.

Q. Confining yourself to the town of Aurora, what would you say in regard to the delivery of those bonds, whether or not they were delivered at or before the completion of the road through the town?

A. I want to answer that question by saying that it is impossible for me state with certainty the time at which the bonds of the township of Aurora were delivered to the contractors, but my best recollection would be that they were delivered in parcels from time to time, and that the last delivery must have been about the first of January, 1871.

Mr. HERRICK:

Q. Is it not a fact that these bonds of the town of Aurora were delivered by the officers of the town to the officers of the railroad company in pursuance of the subscription of the town, the town receiving in return and under that subscription certificates of stock to the town, and that those bonds thus received by the company were forwarded to New York to the trustees, Donaldson and Kent, and by them, Donaldson and Kent, subsequently delivered from time to time to Force & Co. under the contract between Oliver Young and the railroad company as the work progressed?

A. That is the way it was done.

(Signature waived.)

57 EXHIBIT A.

Whereas, a contract was entered into between the parties hereinafter named in the words and figures following, to wit:

Articles of agreement made and entered into this 20th day of January, 1869, by and between Oliver Young, party of the first part, and the Ottawa, Oswego and Fox River Valley Railroad Company, a corporation incorporated by the laws of the State of Illinois, and having a residence therein, party of the second part, witnesseth:

That in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said party of the second part, the said party of the first part doth hereby covenant and agree with the party of the second part to construct and build in a substantial and workmanlike manner a railroad from Streator in the county of La Salle to Geneva in the county of Kane in the State of Illinois, by way of Ottawa, in La Salle county and Oswego in Kendall county upon the line that shall be finally located as the most eligible route for said railroad. Said railroad to be built and finished as described in the following specifications and to be so far completed as to be ready for running of trains on or before eighteen months after the fulfillment by the said railroad company of the conditions precedent hereafter named.

The party of the first part agrees to cut away timber and underbrush whenever they occur and to grub trees and stumps by the roots whenever the places in which they are located are to be occupied by embankments. The said party of the 1st part are to make
58 the grades and curves of said railroad as easy as possible consistent with a due regard to economy. The grades employed in approaching the crossing of the Illinois river in no

case to exceed seventy feet to the mile. The bottom width of all excavations for road-beds. The top width of embankments for road-bed and the width of the beam must correspond with the like measurements of the railroad now built from Winona to Streator.

The bridge over the Illinois river at Ottawa and the bridges over the Fox river wherever they may occur are all to be built upon the plan of Howe's patent truss erected and built in an approved manner to be set on first-class masonry.

The stone for all kinds of masonry must be sound and good and laid upon their natural bed. The mortar used in first-class masonry under water is to be made of good quality hydraulic cement mixed with pure sand in proper portions. The stone for first-class masonry must be laid in regular courses of suitable thickness to secure durability of the work with ample supply of headers and in no instance shall a stone have less bed than height*h* and the interstices of the wall must be well filled with stone of suitable size laid on their broadest bed interstices carefully filled with mortar. The entire road-bed and side tracks are to be ballasted with gravel sand or such other material as can be found upon the line of said road to a suitable depth well tamped and firmly imbed-ed.

All structures requiring masonry excepting the bridges over the Illinois river and Fox river shall at the option of the party of the first part be built of wood whenever in his judgment the same can be properly done with a view to replacing the same at a
59 future day with masonry.

The ties are to be of oak, red elm hemlock tamarra-k cedar or cherry six inches thick flattened on two sides to face not less than six inches two feet six inches apart from center to center.

The iron must be of an approved pattern straight and free from flaws and of sufficient weight for a good and substantial railroad. It must be spiked firmly to the ties using 4 spikes to each tie with good and suitable wrought-iron chairs. All the necessary road and farm crossings must be at least twelve feet wide on the top and planked between the rails and outside as far as the ties extend and there are to be properly constructed cattle-guards made of timber on each side of every public highway also the usual sign-boards denoting the railroad crossing properly inscribed on one side of the railroad at the crossing of public highways. Good and substantial passenger and freight depots with the necessary offices and other buildings which may be required for the business of said road with all necessary water tanks suitably protected from frost shall be erected and furnished by the party of the first part.

The entire line is to be fenced with a good and sufficient board fence built in a suitable permanent manner All work of whatever kind or nature connected with the construction of the said railroad most be done in a workmanlike and careful manner in accordance with the direction of the engineers in charge and his decision shall be final in relation to the execution of the work.

60 For so as aforesaid building the said railroad by the said party of the first part the party of the second part to pay to

the said party of the first part the sum of thirty-three thousand dollars ($33,000) per mile sixteen thousand ($16,000) per mile to be paid in the first-mortgage bonds of the said railroad and seventeen thousand dollars ($17,000) per mile to be paid in the capital stock of the said railroad company. Said stock and bonds are to be issued held controlled and paid over to the party of the first part in the manner following: The stock is to be issued whenever it shall be from time to time required for delivery to such individuals, towns, cities, townships or counties as have already or may hereafter by vote or subscription elect to take a portion of said stock and the subscriptions to the capital stock of the said railroad company whether in notes or bonds shall be received by the party of the first part in exchange for the same amount received by him provided and upon the express condition that said subscription so far as the same shall consist of the bonds of any town township city or county shall be deposited with John J. Donaldson president of the Bank of North America and Henry A. Kent Esq. all of the city of New York as trustees with written instruction requiring the said trustees to hold said bonds until the same shall be required for negotiation for the purpose of expending the proceeds in prosecuting the work of constructing said railroad. And it is also further agreed that the individual subscriptions now made or which may hereafter be made to the capital stock of the said railroad company for which the notes of the said individuals may be made shall be deposited with
61 Milton H. Swift, Esq., president of First National Bank Ottawa, as trustees with written instruction binding said trustees to hold said notes until they can be negotiated and in payment for labor or materials required in the construction of the said railroad and whenever bonds of towns cities townships or counties so subscribing to the said stock shall be delivered to the trustees as aforesaid, then the stock of the said railroad shall be issued and delivered as payment on this contract and the same stock shall be exchanged for the aforesaid subscription bonds by the party of the first part.

It is further agreed between the parties to this contract that in like manner when the notes of individual subscribers shall have been well and truly paid then the stock shall be issued to the party of the first part and by him delivered to the parties who have given and paid their subscription notes.

It is further agreed by the parties to this contract that whenever the capital stock of the said railroad company shall be from time to time required for exchange for the aforesaid subscriptions of every kind a further and equal amount of the said capital stock shall be issued and delivered to the party of the first part by the party of the second part.

The party of the second part further agrees with the party of the first part to obtain and deliver to the trustees as aforesaid the full sum of six hundred and fifty thousand dollars of good reliable subscription to the capital stock of said railroad company by individuals, towns, townships, cities and counties. And the party of the

second part also agrees to obtain the right of way entire
62 from Streator to Geneva of sufficient width for a road-bed and for all needed switches and turnouts, depots, grounds, spoil banks and gravel beds that my be required for the proper construction of said railroad.

The party of the second part also agree- with the party of the first part to issue the bonds of the said railroad as hereinbefore provided and required for the payment to be made to the said party of the first part and to deposit the same with John J. Donaldson E. president of the Bank of North America and Henry A. Kent Esq. all of the city of New York as trustees with written instructions to hold the same until they shall be required for negotiation for money or iron to be used in the construction of the said railroad, said instructions to be signed by the president and secretary of the said railroad and the contractors.

It is expressly agreed between the parties to this contract that the procuring of the right of way and the obtaining of the full sum of six hundred and fifty thousand dollars of good and reliable subscriptions to the capital stock of the said Ottawa, Oswego and Fox River Valley Railroad Company by individuals, towns, townships, cities and counties and depositing the same together with the bonds of the said railroad with the trustees as before recited on conditions precedent to be performed by the party of the second part and when so performed the party of the first part agrees to prosecute the work of building so as aforesaid contracted to be built to final completion as rapidly as the bonds and subscriptions aforesaid can be negotiated for money or materials and to be ready for the running of trains within eighteen months after the conditions precedent above named are complied with and to be fully com-
63 pleted within two years thereafter.

It is further agreed between the parties aforesaid that when the construction of the road above contracted to be built shall be so far completed as to be ready for use it shall be used, managed and controlled by the party of the first part and out of the net earnings of the said road the party of the first part agrees to pay first the taxes that are assessed on said road. Second, the interest on the bonds so as aforesaid issued, and third, the balance shall be declared a dividend upon the stock of said railroad company and paid over to the shareholders thereof. The above conditions as to the running and control of said railroad to remain in force until the completion of the said line from Streator, Geneva or such other terminus as may hereafter be agreed upon is effected at which time the said railroad is to be delivered over to the said railroad company in good order and the payment of expenses taxes and interest and dividends by the party of the first part is then to cease. Reserving however, to said party of the first part or to his heirs and assigns the right to use the track of said road so constructed for the transportation of coal for such time as he may or his assigns may elect by paying to said party of the second part such an amount for wheelage as one rail-pay-another for like services.

In witness whereof the parties hereunto have subscribed their names on this day and year first above written.

(Signed) W. BUSHNELL, *Pres.*
D. F. CAMERON, *Sec.*
OLIVER YOUNG.

64 And whereas, Frederick W. Noble, John S. Noble and William Kellogg of Easton in the State of Pennsylvania, propose to enter into a contract with said Oliver Young by which they agree to construct the said railroad which the said Young has as above recited agreed to construct; now therefore, it is agreed between the said Frederick W. Noble, John Noble and William Kellogg, party of the first part and Oliver Young, party of the second part as follows:

The said party of the first part agrees to build according to the stipulations and specifications named in the agreement above recited the above-named *in the agreement above recited the above-named* railroad the work of grading to be commenced at Streator on or before the first day of June next and to be ironed ready for the running of trains by the first day of November next to the south bank of the Illinois river at Ottawa and the bridge across the Illinois river, also the track and bridge across the Illinois and Michigan canal to be completed ready for the running of trains to the Chicago, Rock Island and Pacific railroad on or before one year from the date of this agreement, provided always that the stage of water shall not continue too high to prevent the building of piers to the bridge and to be completed so far as to be ready for the running of cars from Ottawa to Aurora within eighteen months from the date of commencing work at Streator and to be fully completed within the time specified in the contract between the said Young and the said railroad company.

For as aforesaid building the said railroad the said party of the second part is to pay to the party of the first part the sum of seventeen thousand dollars per mile for the extire distance built to
65 be paid in the stock of said railroad company and for fifty-eight miles of said railroad beginning at Streator the additional sum of fourteen thousand six hundred and fifty-five dollars per mile payable in the first-mortgage bonds of said road and for the remainder of said line to Geneva or so far as it may be constructed the full sum of fifteen thousand dollars per mile is to be paid in the first-mortgage bonds of said road.

It is further agreed that so much of the stock so paid for construction or may be required therefor is to be used by the said Young for issuing to the towns, townships, cities, counties and individuals whose notes and bonds may have been deposited with the trustees as provided in the contract between said Young and said railroad company or for such notes as may have been paid as the case may be and the bonds of said corporations and the notes of said individuals are to be paid over or delivered to the party of the first part on *pro rata* approximate estimates of the engineer in charge made on the first day of each month for the amount of work done. The pay-

ment of railroad bonds above referred to is to be made to the party of the first part whenever a negotiation for the sale of the same shall have been completed for the purpose of purchasing the iron chairs and spikes required for said railroad.

All payments of stock or delivery of bonds required by this contract to be made by written orders of the said party of the second part in favor of the party of the first part or the proper officers of the railroad company or upon the trustees holding the securities and notes as the occasion may require. It is understood that the officers of the said Ottawa, Oswego and Fox River Valley
66 Railroad Company agree to secure and deposit with the trustees named herein the sum of four hundred and seventy-four thousand dollars of subscriptions by towns, townships, cities, counties, and individuals, which amount is to be exchanged as hereinbefore stipulated for stock payments made for constructing the first fifty-eight miles of said railroad.

Ottawa, April 22nd, 1869.

(Signed in duplicate) F. W. NOBLE,
By his attorney, JOHN NOBLE.
JOHN NOBLE.
WILLIAM KELLOGG.
OLIVER YOUNG.

(No. 3.)

Know all men by these presents, that we, the within named, William Kellogg and F. W. Noble, in consideration of one dollar, to each of us paid by John Noble, do hereby assign and transfer to said John Noble the within written contract or instrument and all our interest, right, and title in the covenants and agreements therein contained, for his own proper use and benefit, and we constitute the said John Noble an attorney irrevocable, with full power, at his own charge, in our name to take all legal measures which may be necessary and proper to the full enjoyment of the assigned premises, with power of substitution.

Witness our hands and seal- this 10th day of September, A. D. 1869.

WILLIAM KELLOGG. [SEAL.]
F. W. NOBLE, [SEAL.]
By his attorney, JOHN NOBLE.

In presence of—
A. H. LOCKHART.

67 No. 2.

Know all men by these presents that I, Frederick W. Noble, of the borough of Easton, Pennsylvania, for and in consideration of the sum of one thousand dollars to me in hand paid, as for other causes and considerations *we* hereunto moving, have assigned, transferred, and set over and by these presents do assign, transfer, and set over, unto Charles H. Force, of Ottawa, La Salle county, State of

Illinois, all my right, title, interest, property, claim, and demand of any and every kind and description of, in, and to all that certain contract of Oliver Young with Ottawa, Oswego and Fox River Valley railroad, and of Wm. Kellogg, John Noble, and F. W. Noble with said railroad company, through and from said Oliver Young, to build said O., O. F. R. V. railroad, made April 22, 1869.

And I do hereby disclaim and relinquish all profit, advantage, and benefit heretofore derived or that may be acquired hereafter of, in, to, or out of the same, holding myself relieved and absolved from all and every liability for any contracts which have been heretofore entered into or any debts which may at any time hereafter be incurred in the prosecution of the said business. In testimony whereof I have hereunto set my hand and seal this thirteenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

(Signed) F. W. NOBLE. [SEAL.]

Sealed and delivered in the presence of—
JOHN S. NOBLE.

68 In consideration of twenty-five thousand dollars in the 1st-mortgage bonds of the Ottawa, Oswego and Fox River Valley railroad, the delivery of which is agreed to be made to me by C. H. Force and Ralph Plumb, guaranteed by Oliver Young, I hereby assign and set over to C. H. Force all of my right, title, and interest to and in the within contract of Kellogg, Noble & Co. to build the Ottawa, Oswego and Fox River Valley railroad, together with all personal effects pertaining to said contract and belonging to the said Kellogg, Noble & Co., and hereby authorize the said C. H. Force and his assigns to perform the said contract and receive the benefits that may arise therefrom. This assignment is made upon the express condition that all bonds of townships or of the said railroad company that may have been transferred to the said Kellogg, Noble & Co. and by them have been used as collateral security for money loaned are hereby transfer to the said C. H. Force and to his assigns, and also upon the futher express conditions that the said Kellogg, Noble & Co. are released from all liabilities arising under said contract or for material furnished or labor performed in building the said railroad.

(Signed) JOHN NOBLE.
September 20th, 1869.

Witness:
WILLIAM KELLOGG.

69 Know all men by these presents that I, Charles H. Force, of the town of South Ottawa, State of Illinois, for and in consideration of the sum of one thousand dollars, to me in hand paid, the receipt whereof is hereby acknowledged, and for other causes and considerations *we* thereunto moving, have assigned, transferred, and set over, and by these presents do assign, transfer, and set over, to W. H. W. Cushman, of the town of Ottawa and

State of Illinois, and Ralph Plumb, of the town of Bruce, State of Illinois, each the undivided one-third of my interest, title, and claim and demand of any and every kind and description of, in, and to all that certain contract of Oliver Young with the Ottawa, Oswego and Fox River Valley Railroad Co. and of William Kellogg, John Noble, and F. W. Noble with said railroad company, through and from Oliver Young, to build said O., O. & F. R. V. railroad, made April 22nd, 1869; and I do hereby disclaim and relinquish all profit, advantage, and benefit heretofore derived or that may be acquired hereafter of, in, to, or out of the same two-thirds of said contract. I do hereby authorize and empower the said W. H. W. Cushman and Ralph Plumb, as equal partners with myself, to perform all of the conditions of said contract and to receive with myself equal benefits therefor. Witness my hand and seal this 20th day of September, A. D. 1869.

(Signed) CHAS. H. FORCE. [SEAL.]

70 Whereas Oliver Young has this day assigned to W. H. W. Cushman, C. H. Force, and Ralph Plumb, under the name and style of C. H. Force & Co., a contract entered into between the said Young and the Ottawa, Oswego and Fox River Valley Railroad Company, which assignment was for the consideration of twenty thousand doll's of the 1st-mortgage bonds of the said railroad company and which said bonds have been delivered to the said Oliver Young: Now, therefore, we hereby agree to perform all of the obligations of said assigned contract and to guaranty the said Young against all liabilities which may arise under the terms of said contract or appertaining to the construction of said railroad.

Dated this 21st day of October, A. D. 1870.

(Signed) C. H. FORCE — CO.

Endorsed: Filed July 16, 1889. Wm. H. Bradley, clerk.

71 It is stipulated that the act under which said Ottawa, Oswego and Fox River Valley Railroad Company was incorporated, entitled "An act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company," approved July 21st, 1852, and in force August 22nd, 1852, as printed in the printed volume of the Public Laws of Illinois of the year 1852, may be referred to on the hearing of the cause the same as if formally read in the evidence.

It is further stipulated that the said defendant, The Town of Aurora, was and is a municipal corporation, organized under the general township organization act of the State of Illinois.

THOMAS S. McCLELLAND,
Sol. & of Counsel for said Compl't.
DEXTER, HERRICK & ALLEN,
Sol'rs for Def't O., O. & F. — V. R. R. Co.
R. G. MONTONY,
Solicitor for the Town of Aurora.

(Endorsed:) Filed July 16, 1889. Wm. H. Bradley, clerk.

72 On the same day, to wit, on the sixteenth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

O. MASON
v.
THE TOWN OF AURORA and THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY. } In Chancery.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That said The Town of Aurora, by its proper officer, tender to the proper officer or officers of said The Ottawa, Oswego and Fox River Valley Railroad Company one of its said certificates of stock in said railroad company for ten thousand dollars, par value, and that said railroad company accept and receive said certificate of stock and in place or lieu thereof that said railroad company execute and deliver in due form one or more certificates of stock in said company in the aggregate of six thousand dollars to said complainant, in such denominations as said complainant may direct, and certificates to said town in the aggregate of four thousand dollars, in such denominations as said
73 town may direct, and that said complainant surrender and deliver up to said town the bonds, with all unpaid coupons attached, of said town held by him, in the par value of six thousand dollars, averred in said bill upon receipt of such certificates of stock in said railroad company of the par value of six thousand dollars as aforesaid, and that the complainant have and recover of said defendant, The Ottawa, Oswego and Fox River Valley Railroad Company, his costs in this behalf, and that he have execution therefor.

And thereupon the defendant The Ottawa, Oswego and Fox River Valley Railroad Company prays an appeal to the Supreme Court of the United States, which is allowed upon filing a bond in the sum of three hundred dollars, with surety to be approved by the court, within sixty days from the entry of this decree.

74 Afterward, to wit, on the sixteenth day of August, 1889, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, The Ottawa, Oswego and Fox River Valley Railroad Company, a corporation organized and existing under the laws of Illinois, as principal, and John L. Lathrop, as surety, are held and firmly bound unto O. Mason in the full and just sum of three hundred dollars ($300.00), to be paid to the said Mason, his heirs, executors, administrators, or assigns, and to which

payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

In witness whereof the said Ottawa, Oswego and Fox River Valley Railroad Company has caused its corporate name to be hereunto signed by its duly authorized president, John L. Lathrop, and its seal to be affixed hereto by the secretary, and the said John L. Lathrop has hereunto set his hand and seal this the — day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas, on the 16th day of July, A. D. 1889, at a session of the circuit court of the United States for the northern district of
75 Illinois, in a suit depending in said court between the said O. Mason, as plaintiff, and The Town of Aurora and the said Ottawa, Oswego and Fox River Valley Railroad Company, as defendants, a final decree was rendered against the said Ottawa, Oswego and Fox River Valley Railroad Company, and the said Ottawa, Oswego and Fox River Valley Railroad Company having obtained the allowance of an appeal from said decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said Ottawa, Oswego and Fox River Valley Railroad Company shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

OTTAWA, OSWEGO & FOX RIVER VALLEY RAILROAD COMPANY,
[SEAL.] By JNO. L. LATHROP, *President.*
JNO. L. LATHROP, *Surety.*

Attest: L. O. GODDART, *Secretary.*

Approved Aug. 16, 1889.

M. W. FULLER,
C'f Justice U. S., & Acting Circuit Justice 7th Circuit by Request of Mr. Justice Harlan.

(Endorsed:) Filed Aug. 16, 1889. Wm. H. Bradley, clerk.

76 Afterward, to wit, on the thirty-first day of August, 1889, there was filed in said clerk's office a certificate of evidence in said entitled cause; which said certificate of evidence is in the words and figures following, to wit:

Certificate of Evidence.

Circuit Court of the United States, Northern District of Illinois.

O. MASON
vs.
TOWN OF AURORA, THE OTTAWA, OSWEGO AND Fox River Valley Railroad Company, and The Chicago, Burlington and Quincy Railroad Company. } In Chancery.

Be it remembered that on the final hearing of this cause the complainant and defendants respectively gave in evidence the depositions of the several witnesses examined by them respectively and returned into court, together with an agreed statement of facts and the several documents and exhibits and all other evidence offered by said complainant and said defendants respectively and returned into court, and that the foregoing was all the evidence introduced on the hearing of said cause.

Sealed and dated this sixteenth day of July, 1889.

W. Q. GRESHAM. [SEAL.]

(Endorsed:) Filed Aug. 31, 1889. M. H. Bradley, clerk.

77 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein O. Mason is complainant and The Town of Aurora and The Ottawa, Oswego and Fox River Valley Railroad Company are defendants as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, northern division, this fifth day of September, 1889.

WM. H. BRADLEY, *Clerk.*

78 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October Term, A. D. 1889.

OTTAWA, OSWEGO & FOX RIVER VALLEY RAILROAD COMPANY, Appellant,
vs.
O. MASON, Appellee. } Appeal from the United States Circuit Court for the Northern District of Illinois.

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said

The Ottawa, Oswego & Fox River Valley Railroad Company, appellant, by Wirt Dexter and John J. Herrick, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in decreeing that the said The Ottawa, Oswego & Fox River Valley Railroad Company execute and deliver to said complainant, O. Mason, certificates of stock in said Ottawa, Oswego & Fox River Valley Railroad Company and certificates of said stock to said town of Aurora, as directed in said decree.

2. The court erred in decreeing that the said Ottawa, Oswego & Fox River Valley Railroad Company accept and receive said certificate- of stock in said bill mentioned and in place or lieu thereof execute and deliver the said certificates of stock in said company in the aggregate of six thousand dollars to said complainant, O. Mason, and said certificates of stock to said town of Aurora in
79 the aggregate of four thousand dollars, as directed by said decree.

3. The court erred in decreeing that the said Ottawa, Oswego & Fox River Valley Railroad Company issue new certificates of stock in lieu of said alleged certificates of stock originally issue- to said town of Aurora and more particularly described in said bill.

4. The court erred in decreeing that said alleged certificates of stock originally issued to said town of Aurora and more particularly described in said bill were valid certificates of stock in said Ottawa, Oswego & Fox River Valley Railroad Company.

5. The court erred in rendering a decree in favor of said complainant in said original bill.

And the said The Ottawa, Oswego & Fox River Valley Railroad Company prays that the decree aforesaid may be reversed and annulled and that it may be restored to all things which it hath lost by occasion of the said decree, etc.

WIRT DEXTER,
JOHN J. HERRICK,
Attorneys for Appellant.

Endorsed on cover: Case No. 13,852. N. Illinois C. C. U. S. No. 242. The Ottawa, Oswego & Fox River Valley Railroad Company, appellant, *vs.* O. Mason. Filed October 21, 1889.

Office Supreme Court U. S.
FILED.
DEC 3 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY, *Appellant*,

vs.

O. MASON, THE TOWN OF AURORA, *Appellees.*

Appeal from Circuit Court of the United States for the Northern District of Illinois.

POINTS FOR APPELLANT ON MOTION TO ADVANCE.

JOHN J. HERRICK,
ATTORNEY FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

THE OTTAWA, OSWEGO, & FOX RIVER VALLEY RAILROAD COMPANY, *Appellant*,

vs.

O. MASON, THE TOWN OF AURORA, *Appellees.*

} peal from the Circuit Court of United States for the Northern District of Illinois.

POINTS FOR APPELLANT ON MOTION TO ADVANCE.

This is a motion by appellee, O. Mason, to advance the above cause, No. 1,445, to be heard with *Illinois Grand Trunk Railway* v. *Wade*, No. 554, and *Illinois Grand Trunk Railway* v. *Wade*, No. 555.

It is not claimed that there are any such special and peculiar circumstances in this case, as, under the rules and decisions of this court, are necessary, to justify a motion to advance the cause to be heard as a separate case. That there is no ground for such a motion is clear.

Amory v. *Amory*, 91 U. S., 356.
Sage v. *Central R. R. Co.*, 93 U. S., 419.
Carter v. *Greenhow*, 109 U. S., 64.

It is stated, as the ground of the motion, that "the ques-"tions of law involved in said three causes *are identical.*" The motion is evidently based on section 8 of rule 26, which provides that "two or more cases involving the same "question may, by leave of the court, be heard together, "but they must be argued as one case."

The motion should be denied.

1. Appellant, the Ottawa, Oswego and Fox River Valley Railroad Company, denies that this case involves "the same question" as numbers 554 and 555, or that the three cases can properly be "argued as one case," and objects to advancing this case to be heard with the other cases.

We also object on behalf of the appellant in Nos. 554 and 555, the Illinois Grand Trunk Railway Company, to having the three cases heard together and argued as one case.

The other appellee in this case, the Town of Aurora, also, while nominally consenting that the cases shall be heard together, in effect objects, by expressly "reserving "to itself the right to argue why the decree entered in "the cause, wherein it is a party, should be affirmed, irre-"spective of the positions assumed by the parties in the "suits numbered 554 and 555, now pending in said Su-"preme court." (Petition to advance, 4.)

It was not the purpose of section 8, rule 26, to enable one party to a cause to compel his adversary to argue his case with another cause, to which he is not even a party, "as one case," much less to compel the parties to the other cause to argue their case "as one case" with the cause proposed to be advanced. In addition to the confusion and injustice which might result to the parties

themselves from giving such an effect to the rule, the burden would be thrown on this court, as is sought to be done in this case, of going through the records in both cases for the purpose of determining whether the cases in fact involve "the same question," and whether they can properly "be heard together" and "argued as one "case."

The plain purpose of the rule was to enable parties to two or more cases to have the cases heard together, all parties consenting, "by leave of the court," and subject to the requirement that the cases "must be argued as "one case," and not to enable one party to compel such hearing and argument against the objections of the other parties to the cases.

This precise point was expressly decided in *Louisiana* v. *New Orleans*, 103 U. S., 521. In that case, this court, having decided at a previous term that the case did not present questions which entitled it to be advanced a motion was made on behalf of one of the parties that the case be heard with a case preceding it on the docket, on the ground that it involved the "same question" as the prior case. The other party, however, objected. This court, in denying the motion, say:

"It is now suggested that *United States* v. *New Orleans* involves the consideration of the same questions and the construction of the same statute, and we are asked to advance this case to be heard with that. To this the defendant in error objects. When a case is advanced to be heard with another, which has precedence on the docket, the rule is to require the two to be argued as one. This rule is never departed from except under very peculiar circumstances. As we cannot compel a party against his will to argue his case with another, we have always heretofore denied motions of that kind when they are resisted. There are no such special circumstances in this

case as to make it proper that it be advanced and heard separately from the other. The motion to advance will, therefore, be overruled."

It is not claimed for appellee that there are any such special circumstances in this case as make it proper that it be advanced and heard *separately* from the others, and such is not his motion. It follows that under the direct ruling in *Louisiana* v. *New Orleans* the motion should be denied.

2. This application illustrates the consequences that will follow, if it is held that a case may be advanced to be heard with another without the consent of all the parties. The record has not yet been printed in any of the three cases. (Nos. 554, 555 and 1445.) In support of this motion, counsel makes certain general statements as to the questions of law and fact involved in both the case sought to be advanced and the cases with which he asks that the case shall be heard. As these statements involve a consideration of the whole record in each case, they could not well be established by extracts from particular portions of the records, and counsel has neither given such extracts, nor references to particular pages of the records.

We, as counsel for the different appellants in each of the three cases, insist that the questions are different. The appellee in this case, the town of Aurora, virtually contends that the questions are different. The Towns of Walnut and LaMoille, appellees in the other suits, have not given their assent to the cases being heard together.

In this situation, the court is called upon to examine for itself the records in the three cases, and to determine from such examination whether the cases in fact involve the "same question," and can properly be "argued "as one case"; and that, too, when it must be conceded

that the present case involves no question which entitles it to be advanced over the large number of cases which now precede it on the docket.

3. It is true that in this case the court below decreed that appellant issue to appellee, Mason, certain shares of stock, in place of other shares of stock previously issued to the town of Ottawa, for which the town issued certain bonds which were held to be void. It is also true that, in the Wade cases the court decreed that the appellant in those cases, the Illinois Grand Trunk Railway Company, issue new shares of stock, in place of other shares of stock issued to the towns of Wayne and Walnut, for which those towns issued certain void bonds.

But it does not follow because of this similarity in the relief, that therefore, as stated by counsel, " the questions " of law involved in said three causes are identical," or that " the determination of one case will determine all " three."

Not one of the parties to this case is a party to the Wade cases. The transactions, out of which the questions arise, were between wholly different parties. The charters,under which the companies acted, were different. The laws, under which the towns acted, were different. It is claimed in the Wade cases that the issue of stock was prohibited by a constitutional provision, and therefore void. In this case, the validity of the stock is denied on the ground that its issue was *ultra vires* of the corporation. While an equitable estoppel is set up by appellee in both cases, the question of estoppel arises on wholly different facts in each case. The attitude of the towns in the two cases is wholly different. In the Wade cases, it is alleged that the officers of the town refuse to deliver the stock and oppose the claim. In this case, a virtual agreement

of exchange is set up. And in other respects the facts and grounds and conditions of relief differ in the two cases.

How far these differences in the facts and in the questions raised are material, can only be determined on the argument of the cases. It may be that a ruling will be made on some point of law in the cases first on the docket which will be a precedent in this case. On the other hand, the court may express views on the different propositions involved in the cases first heard, which, as applied to the particular facts, will clearly distinguish those cases from this. In any view, the differences in facts are such, that if this case should be advanced, the cases, while nominally heard together, would necessarily separate themselves in argument, and the one argument in form would be two arguments in fact.

4. The fact that the same counsel who appears for the appellant in this case, also appears for the appellant in Nos. 554 and 555 cannot affect the question. The fact remains that the parties appellant are different, and object to the cases being heard together, and their right to object to the cases being thus heard must be the same, whether they are represented by the same or different counsel. The further fact, referred to by counsel, that the same counsel appears on behalf of appellee in this case, who appears for the appellee in Nos. 554 and 555, so far from being a reason for advancing the case, shows that if, as is claimed as the sole ground of the motion, the cases involve the same question, precisely the same argument on that question will be presented on behalf of appellee in Nos. 554 and 555, as would be presented if the cases had been heard together.

JOHN J. HERRICK,
Attorney for Appellants
in Nos. 554, 555 and 1,445.

Office Supreme Court U. S.
FILED.
NOV 6 1889
JAMES H. McKENNEY,
CLERK.

24

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 1445.

OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY, *Appellant*,

vs.

O. MASON (THE TOWN OF AURORA BEING A PARTY), *Appellee*.

Appeal from the Circuit Court of the United States for Northern District of Illinois

PETITION AND MOTION TO ADVANCE SAID CAUSE.

To the Honorable the Chief Justice and Associate Justices of said Court.

Your petitioner, O. Mason, appellee in above cause, respectfully represents that he is the owner of certain bonds issued by The Town of Aurora, in said district, to aid in the construction, and in payment of shares in the capital stock, of said Ottawa, Oswego and Fox River Valley Railroad, which said bonds have been adjudicated void. That he filed his bill in said cause against said town and said railroad company for the purpose of subrogating himself to the rights of said town in and to the stock of said railroad company, held and owned by said town, and paid for by said bonds, in an amount equal to the amount of bonds of said town held and owned by said appellee, basing his application upon grounds fully set forth in his bill filed in said cause, and to which he refers.

Your petitioner further avers, that the reasons or grounds for the relief prayed in his said bill are the same and of a like character as the allegations and prayers in the two bills filed by one J. H. Wade, in said Circuit Court, against The Illinois Grand Trunk Railway and the towns of La Moille and Walnut, and the purposes and objects are the same, which said causes are now pending in said Supreme Court on appeals from said Circuit Court, and entitled and numbered as follows, viz.: *Illinois Grand Trunk Railway* v. *Wade* (La Moille a party), No. 554; *Illinois Grand Trunk Railway* v. *Wade* (Walnut a party), No. 555.

That the questions of law involved in said three causes are *identical*, and could and ought to be argued in one brief, and considered by the court together, and as one cause (inasmuch as the determination of one case will determine all three), and time and labor saved both to court and counsel, and costs and expenses saved to all the parties to said several suits.

Your petitioner, therefore, moves the court that said cause of *The Ottawa, Oswego and Fox River Valley Railroad Company* v. *O. Mason* (The Town of Aurora being party thereto), No. 1,445, be advanced on the docket of said court, to be argued and considered with, and at the same time as, said causes of *Illinois Grand Trunk Railway* v. *Wade* (La Moille being a party), No. 554, and *Illinois Grand Trunk Railway* v. *Wade* (Walnut being a party), No. 555, are argued and considered.

The objects and purposes of said three suits are the same, counsel for appellants are the same, counsel for appellees, Mason and Wade, are the same, and the rules of law applicable to one of said causes are equally appli-

cable to the others, and questions of law involved in one case limit the questions of law in the other cases.

For the foregoing reasons your petitioner respectfully asks that this motion be allowed.

THOMAS S. MCCLELLAND,
GEORGE A. SANDERS,
Counsel for said O. Mason and J. H. Wade.

CHICAGO, ILLINOIS, October 25, 1889.

NOTICE.

Messrs. Dexter, Herrick & Allen, counsel for said The Ottawa, Oswego and Fox River Valley Railroad Company, and The Illinois Grand Trunk Railway.

Hon. R. G. Montony, counsel for said The Town of Aurora, and George L. Paddock, Esq., counsel for said The Towns of La Moille and Walnut.

GENTLEMEN—Take notice, that upon the going in of the Supreme Court of the United States, at Washington, in the District of Columbia, on Monday, December 2, A. D. 1889, at 12 o'clock noon, or as soon thereafter as counsel can be heard, we will move said court to advance said cause of The Ottawa, Oswego and Fox River Valley Railroad Company against O. Mason, in which said The Town of Aurora is a party, upon the docket of said court, and numbered 1,445, at the present term thereof, to be argued, taken and considered by said Supreme Court at the same time and together with the causes of The Illinois Grand Trunk Railway against J. H. Wade (in which The Town of La Moille is a party), No. 554, and The Illinois Grand Trunk Railway against J. H. Wade, in which The Town of Walnut is a party), No. 555, at which time and place you can be present if you so desire, which said motion

will be based upon the above and foregoing statement of facts and the records in said three causes now on file in said Supreme Court.

Very respectfully yours,

THOMAS S. MCCLELLAND,

GEORGE A. SANDERS,

Counsel for O. Mason and F. H. Wade.

CHICAGO, ILLS., Oct. 25, 1889.

The above named, The Town of Aurora, being interested in the speedy disposition of said cause No. 1,445, and recognizing the propriety of advancing said cause to be argued and considered with said causes Nos. 554 and 555 on the docket of said Supreme Court, at its October term, A. D. 1889, hereby consents to said advancement, and agrees that said motion may be granted, notice whereof being hereby accepted, said The Town of Aurora hereby reserving to itself the right to argue why the decree, entered in the cause wherein it is a party, should be affirmed irrespective of the positions assumed by the towns in the suits numbered 554 and 555, now pending in said Supreme Court.

R. G. MONTONY,

Counsel for The Town of Aurora.

AURORA, ILLINOIS, Oct. 25, 1889.

We hereby accept service of above petition and notice, by copy this 29th day of October, A. D. 1889, at Chicago, Illinois.

DEXTER, HERRICK & ALLEN,

Attorneys for Appellant.

GEO. L. PADDOCK,

Of Counsel for La Moille and Walnut in Court below.

Office Supreme Court U. S.
FILED.
APR 6 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

TERM NO. 242.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY,

Appellant,

vs.

O. MASON,

Appellee.

Appeal from the Circuit Court of the United States for the Northern District of of Illinois.

BRIEF FOR APPELLEE.

We submit this case on authority of

Ills. Grand Trunk Railway v. *J. H. Wade,*
140 U. S., 65.

The bill filed in this case recites that the appellee was the owner of six of the bonds of the town of Aurora, of the value of $6,000, issued by that town in 1869, and being a part of $60,000—par value—of the bonds of the town issued and delivered to the appellant railroad company in payment for $60,000 of its capital stock, evidenced by a certificate for that amount of stock issued by the

railroad company and delivered to the town, and held and owned by it at the time the bill was filed. That appellee became the purchaser of the $6,000, par value, of the town bonds before their maturity, for a valuable consideration, and without notice of any defenses to the same. That payment of the bonds by the town had been refused; that he had sued to recover the amount due thereon, and that the court held them void for want of power in the town to issue.

The bill further avers that the town was ready and willing to turn over and surrender to appellee $6,000 of its stock in the railroad company in exchange for the $6,000 in bonds, with the interest coupons attached thereto, but that it was unable so to do because the $60,000 in stock held by the town was in one certificate, and that the officers of the town had failed and refused to have the certificate surrendered and other certificates of smaller denominations issued by the railroad company, so as to enable it to deliver to appellee $6,000 of the stock in exchange for the bonds held by him.

The town of Aurora answered the bill, setting forth the action of the town in passing a resolution at a town meeting directing the exchange of stock held by it for an equal amount, par value, of its bonds, and that the officers of the railroad company refused to take up its certificate for the gross amount of stock held by it and issue in lieu thereof a number of certificates aggregating the same amount, but in smaller denominations, so as to enable it to exchange the stock for its bonds in such amounts as might be held by the bondholders respectively; and avers its willingness to exchange stock for the bonds held by appellee, to-wit, to deliver to appellee sixty shares of the

stock in the railroad company for the six bonds held by appellee; providing, the railroad company will make it possible to do so, by taking up the single certificate of stock and issuing others in the place thereof. (Pr. Rec., 10, 11.)

Proofs were taken and the cause tried, and issues found for the appellee and a decree entered in conformity with the prayer of the bill. (Pr. Rec., 38.)

The evidence upon which the decree was entered is preserved in the record.

At the October A. D. 1890 term of this court, the case of the Illinois Grand Trunk Railway against Jeptha H. Wade was argued, involving the same issues precisely, and this court held that the bondholder was equitably entitled to the stock which had been paid for by sale of bonds given by the municpality in payment for the stock, after the payment of the bonds had been repudiated and a judicial finding against the validity of the bonds.

In the Wade case we cited

Louisiana v. *Wood*, 102 U. S., 294.
Hicthcock v. *Galveston*, 96 U. S., 341.
Marsh v. *Fulton*, 10 Wall., 684.
Parkersburg v. *Brown*, 106 U. S., 487.
Chapman v. *Douglass Co.*, 187 U. S., 348.
Campbell v. *Morgan*, 4 Bradwell 100, and cases cited therein.

We deem it unnecessay to further argue this case. The principles involved were carefully considered by this court in *Ill. G. T. Ry. Co.* v. *Wade*, and decided in favor of the bondholders. We rely on that case as it is identi-